

Estate of Richard Lucero

IBIA 71-3

Decided December 28, 1970

Indian Lands: Descent and Distribution: Wills

Where the evidence in a hearing record clearly shows that the proponents have established a prima facie case of the validity of a will and the contestants have shown only opportunity for undue influence without presenting any evidence of the exercise of undue influence and failed to establish testamentary incapacity of the testator at the time of execution, the finding of validity of the will by the Examiner of Inheritance will be upheld on appeal.

Indian Lands: Descent and Distribution: Appeals: Generally

The "law of the case" doctrine is as applicable to proceedings before trial and appellate administrative tribunals as it is to proceedings before trial and appellate courts, in cases where the ingredients comprising the elements of the doctrine are present. This doctrine holds that a decision on a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court, or on a later appeal in the appellate court, unless the evidence in a subsequent trial is substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.

Indian Lands: Descent and Distribution: Appeals: Final Decision

When, upon review of the proceedings in the probate of an Indian will, the Board of Indian Appeals determines that the findings of the Examiner of Inheritance and his application of the law are correct, and that the proceedings in all other respects were properly conducted, the decision of the Board affirming the decision of the Examiner is the final decision of the Department of the Interior.

In the Matter of the Estate of	:	
	:	
RICHARD LUCERO, Deceased	:	Probate K - 189-62
Allottee No. 1816 of the	:	IA- 1435
Blackfeet Indian Reservation	:	
in Montana	:	Docket No. IBIA 71-3

DECISION ON APPEAL

December 22, 1970

Richard Lucero, Blackfeet Allottee No. 1816, died September 13, 1961 at the age of 81 years. A hearing was duly held at the Blackfeet Indian Agency on August 23, 1962, at Browning, Montana to determine heirs, probate the will of decedent if one be found, and consider creditors' claims. A final order was issued on December 20, 1962, wherein a last will and testament, executed by the decedent on October 13, 1939, was approved and distribution ordered thereunder. The only known heirs of decedent were two daughters, namely, Gladys Lucero Elsethagen and Eunice Lucero Vaile. By the terms of the will, Gladys was bequeathed the sum of \$1.00 and the remainder of the estate was left to the other daughter, Eunice, including all of the decedent's inherited trust property. The estate was appraised at \$7,197.33.

In July 1963, a Rose Mary (Leslie) Huff, Blackfeet unallotted enrollee No. 4036 of 8639 110th Avenue, S.E., Renton, Washington, personally called at the Blackfeet Indian Agency and presented a purported last will and testament, executed by the decedent on October 12, 1957. On July 10, 1963, the said Rose Mary Huff filed a petition for reopening and attached to the petition a copy of said purported will dated October 12, 1957.

The purported will dated October 12, 1957 contained the following provisions:

"FIRST: To my two daughters, GLADYS SMITH, now living at Browning, Montana and EUNICE VAILE, now living at Seattle, Washington, I give and bequeath the sum of one dollar (\$1.00) to each of them. I declare that I have my personal reasons for limiting their bequests to said sums: and I declare that I have no spouse and no other child or children nor issue of any deceased child.

"SECOND: To Mrs. LESLIE AUBREY HUFF, of Kennydale, Washington, who has befriended me through several years past, I give, bequeath, and devise and will all the rest, residue and remainder of my properties and estate, wheresoever situated and of whatsoever character, real, personal or mixed, she to have and to hold the same.

"THIRD: I hereby nominate and appoint the said Mrs. LESLIE AUBREY HUFF to be the Executrix of this my LAST WILL AND TESTAMENT, and I authorize that she act as such without bond for any purpose.

"FOURTH: I hereby revoke any and all other or prior WILLS or Testamentary Dispositions by me at any time heretofore made."

In her petition for reopening, among other things, Mrs. Huff alleged: that she had no actual notice of the actual proceedings in the estate of Richard Lucero; that she had been a resident of the State of Washington for the past 15 years; that although she was aware of the death of Richard Lucero, she was advised by counsel to deliver in person a copy of the will dated October 12, 1957, rather than mail it to the Blackfeet Agency office; and that due to ill health she was unable to make the trip to Browning, Montana for purposes of the personal delivery until July of 1963.

The Examiner of Inheritance gave notice to counsel for Eunice Lucero Vaile that the petition appeared to show merit and allowed 45 days from October 18, 1963, within which time to file an answer or brief in opposition to said petition.

Eunice Lucero Vaile and her counsel duly filed both an answer and a brief in opposition based primarily upon the following grounds:

- (1) That petitioner, Mrs. Huff, failed to file an appeal with respect to the decree of distribution entered December 20, 1962, within 60 days of that time and such decree became final on February 20, 1963;

- (2) That the petition to reopen did not present a justifiable reason for the failure to present the purported will dated October 12, 1957 at the hearing on the original proceedings;
- (3) That petitioner admitted having knowledge of the death of the testator, sent flowers to the funeral and therefore had knowledge of the instant probate proceedings;
- (4) That petitioner failed to exercise due diligence and to take steps reasonably calculated to discover whether deceased left any estate or whether his estate was being probated;
- (5) That petitioner neglected to perform her duty and obligation as Executrix nominated in the alleged will of October 12, 1957, to timely present the purported will or to disclose its existence, and nearly two years is an unreasonable length of time, and too late;
- (6) That petitioner failed for an unreasonable length of time to follow advice of counsel to notify the Examiner of Inheritance of the existence of such purported will; and
- (7) That ill health did not prevent petitioner from timely presenting said purported will for probate or from giving reasonable notice of its existence.

The thrust of the argument in the brief opposing the reopening was that the petitioner had "implied" notice, if not "actual" notice of the original proceeding in this case, but it was admitted that the Examiner had discretionary power to allow or deny the petition.

The Examiner of Inheritance, Elge, at Billings, Montana, held that while under State court decisions the petitioner would be barred by laches from reopening the probate, the same test cannot be applied in Indian probate proceedings of the Department of the Interior where said laws do not apply. An order was thereupon entered November 23, 1964, requiring the reopening of the estate for the purpose of considering the purported last will and testament executed by Richard Lucero on October 12, 1957, and the case was transferred to Examiner Montgomery of Portland, Oregon for further proceedings.

Pursuant to 25 CFR 15.19, Eunice Lucero Vaile on December 24, 1964, filed an appeal to the Secretary of the Interior from said order reopening the estate upon the following grounds:

- (1) That the Decree of Distribution entered in the proceedings on December 20, 1962 became final on February 20, 1963;
- (2) That the Examiner had no jurisdiction or authority to reopen said proceedings pursuant to Section 15.18 of the regulations for the reason that Petitioner, Rose Mary Aubrey Huff, had actual notice of the original proceedings;
- (3) That Petitioner is barred from reopening by reason of laches in failing to present timely the second will for probate and further for failure to follow advice of her counsel; and
- (4) That the trusteeship of the United States over Indian lands does not afford a sufficient basis in fact or in law for granting the petition of an emancipated Indian who has lived substantially all her life among the citizens of the United States generally.

After considering the briefs of the interested parties and pursuant to his delegated authority from the Secretary, the Associate Solicitor for Indian Affairs, Department of the Interior, on June 13, 1966 entered the decision on appeal affirming the decision of the Examiner granting the petition of Mrs. Huff to reopen the proceedings. In the course of the decision the Solicitor held in substance, as to each of the contentions of appellant, respectively, as follows:

- (1) The finality of the Decree of Distribution entered on December 20, 1962 depends upon whether Mrs. Huff had notice of the probate proceedings as contended by appellant and as required by 25 CFR 15.18. The facts appear to be undisputed that Mrs. Huff received notice of the death of Richard Lucero on the day he died but no further word concerning probate proceedings until after the Decree had been entered.
- (2) Although notice of decedent's death put Mrs. Huff on notice that his estate would be probated sometime after

his death, she was not thereby notified that the hearing in the matter would be held on August 23, 1962 at the Blackfoot Indian Agency, Browning, Montana, nor did she have notice of other pertinent facts of the original proceeding. Adopting appellant's argument would mean substituting the words, "actual notice of death" for "actual notice of the original proceedings." It is obvious that the two terms are not synonymous and therefore that such substitution cannot properly be made.

(3) Since 25 CFR 15.18(a) allows a three-year period within which to petition for reopening, the argument is not persuasive that a petitioner filing within that prescribed time may be denied a reopening simply because it was within his power to have filed sooner than he did.

(4) Appellant's contention that the United States does not have sufficient basis in law or fact for granting the petition of an emancipated Indian is without merit. Whether Mrs. Huff has been "emancipated" is irrelevant. The provisions of 25 CFR 15.18, which govern the reopening of restricted Indian estates, apply to all petitioners, Indian and non-Indian alike

Pursuant to said decision on appeal and in accordance with her previous order of November 23, 1964, Examiner of Inheritance, Frances C. Elge, on July 5, 1966, issued an Examiner's Notice to all interested parties that proceedings on the purported will of October 12, 1957 would be conducted by Richard J. Montgomery, Esq., Examiner of Inheritance, Portland, Oregon.

On or about July 19, 1966, Eunice Lucero Vaile through counsel filed an action in the United States District Court for the Western District of Washington, Northern Division, entitled Eunice Lucero Vaile v. Udall, Civil No. 6808, whereby she sought to have the decision of the Secretary of the Interior, dated June 13, 1966, vacated, reversed and set aside. The plaintiff also requested the court to issue an order postponing the effective date of the Secretary's order and decision until the conclusion of the court case.

On January 13, 1967 the U. S. Attorney filed a motion to dismiss or in the alternative for summary judgment on the grounds that the action was brought for relief from an interlocutory order and plaintiff had failed to exhaust her administrative remedies and further,

that the complaint failed to state a claim upon which relief could be granted. Plaintiff also moved for a summary judgment.

On May 12, 1967 the United States District Judge entered an Order and Memorandum Decision granting the defendant's motion for summary judgment on the grounds alleged by defendant and held further that the law did not make the matter reviewable by the District Court since the action taken by the Department of the Interior had not resulted in "final agency action." 5 U.S.C. §704 (Supp. V, 1964); Federal Power Commission v. Edison Co., 304 U.S. 375 (1938); Abbott Laboratories v. Celebrezze, 352 F.2d 286 (3rd Cir. 1965).

On August 21, 1968, Examiner David J. McKee issued a Notice of Hearing After Reopening which was duly distributed and posted setting the matter for hearing on September 17, 1968, at Seattle, Washington on the question of whether the will of October 12, 1957 should be approved. A full and complete two-day hearing of record was held in accordance with the notice. The parties, their counsel and witnesses appeared for both sides with full opportunity for the examination and cross-examination of witnesses and the production of documentary evidence.

Examiner McKee, who conducted the hearing, entered an Order After Rehearing Approving the Will of October 12, 1957 at Billings, Montana on March 7, 1969 in which he made the following findings:

- (1) No issue as to the technical aspects of due execution of the will of October 12, 1957 was specified at the pretrial conference, and no evidence of irregularity in the execution thereof was presented at the hearing.
- (2) The issues specified and defined at the pretrial conference and as presented at the hearing were limited to: (a) the issue of testamentary capacity of the testator on October 12, 1957; and (b) the issue of the exercise of undue influence upon the testator relative to the execution of the will of October 12, 1957.
- (3) The proponent of the will of October 12, 1957 presented sufficient testimony to constitute a prima facie case in favor of the will.
- (4) The contestants were able to establish only an opportunity for undue influence, and failed to establish mental incapacity at the time the will was executed.

Based upon the foregoing findings, the Examiner made the following significant conclusions:

(1) The last will and testament of Richard Lucero, dated October 12, 1957, was properly executed while the testator was of sound and disposing memory, and not actuated by fraud, undue influence, coercion, or duress, and expresses his true wishes as to the disposition of this estate and is entitled to approval as his last will and testament.

(2) The order of December 20, 1962 approving the will of October 13, 1939, and the order of distribution thereunder, must be vacated, effective as of the date of the filing of the petition for reopening July 10, 1963, but any distribution made prior to that to the distributees named in such order must not be disturbed.

Whereupon the Examiner ordered, adjudged and declared the October 12, 1957 will approved and testator's full interest in all his trust property be distributed to Rose Mary (Leslie) Aubrey Huff.

On May 7, 1969, Eunice Lucero Vaile, through counsel of record, petitioned the Examiner for a rehearing but prior to that, on March 24, 1969, filed a Notice of Appeal to the Secretary for administrative review of the Examiner's order of March 7, 1969. Both documents were based on identical grounds and identical with the grounds used unsuccessfully by appellant in her various appeals to contest the petition to reopen filed by Mrs. Huff. The matter of the administrative appeal to the Secretary was handled by the Office of the Regional Solicitor. On June 30, 1969, he held: "Where the record on appeal contains both a petition for rehearing and a notice of appeal, filed for a review of an Examiner's initial order after reopening of the case and a further hearing and the record indicates that no action has been taken by the Examiner on the petition for rehearing, the appeal will be dismissed without prejudice and the case remanded to the Examiner for appropriate action on the petition for rehearing."

Pursuant to the remand (by the Solicitor) for further proceedings, the Examiner, on September 25, 1969, denied the Petition for Rehearing. In the course of his decision, the Examiner in substance pointed out that Mrs. Vaile's counsel offered nothing new and was merely pressing the same arguments made several times before

unsupported by the law, the facts or substantial evidence of any kind, and that the previous rulings of the Department, particularly the Decision of the Solicitor acting for the Secretary in the first appeal to the Secretary, constituted the “law of the case.”

In this same decision the Examiner appropriately quoted excerpts from the language of White v. Murtha, 377 F.2d 428, (5th Cir. 1967) regarding the “law of the case” rule. Among other things, the court in that case said:

The “law of the case” rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that “there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members,” [citing Roberts v. Cooper, 61 U.S. (20 How.) 467 (1857)], and that it would be impossible for an appellate court “to perform its duties satisfactorily and efficiently” and expeditiously “if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal” thereof. [citing General American Life Ins. Co. v. Anderson, 156 F.2d 615, 618 (6th Cir. 1946); Great Western Telegraph Co. v. Burnham, 162 U.S. 339, 344 (1896); 5B C.J.S. Appeal and Error §1821 (1958)]

While the “law of the case” doctrine is not an inexorable command, [citing White v. Higgins, 116 F.2d 312 (1st Cir. 1940)], a decision of a legal issue or issues by an appellate court establishes the “law of the case” and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice. [citing Lincoln National Life Ins. Co. v. Roosth, 306 F.2d 110, 113 (5th Cir. 1962); Chicago St. P., M & O Ry. Co. v. Kulp, 102 F.2d 352, 354 (8th Cir. 1939)]

Counsel for Mrs. Eunice Lucero Vaile then filed a third Notice of Appeal to the Secretary on October 13, 1969. This appeal was from

the decision of the Examiner denying the Petition for Rehearing, dated September 25, 1969; from the Order After Hearing Approving the Will of October 12, 1957; and from the Order Reopening the Estate, dated November 23, 1964.

This matter is presently before the Board of Indian Appeals, Office of Hearings and Appeals, by virtue of a reorganization of the Department of the Interior which transferred the administrative adjudication functions of the Secretary from the Office of the Solicitor to the Office of Hearings and Appeals. The complete record of this case, including the final Notice of Appeal, was received by the Office of Hearings and Appeals on September 14, 1970.

This Board has reviewed the record of this case in detail. It observes that the grounds alleged as the basis for appeal are precisely the same four points of argument presented to the Secretary on the first appeal as well as at other stages of these proceedings. No different legal authority is cited. In fact no brief at all in support of the appeal was filed by the appellant. It, therefore, becomes mandatory upon this Board to hold, and it does hold, that nothing has been presented nor does any authority appear to exist which would justify a departure from the "law of the case" heretofore established. We hold that the record discloses the findings of the Examiner to be supported by substantial evidence and further that the appellant has been afforded full and complete administrative due process.

Wherefore, pursuant to the authority vested in this Board under its delegation from the Secretary, 35 F.R. 12081, it is the decision and order of this Board, and this does order, that the findings, conclusions and order contained in the Examiner's Denial of Petition for Rehearing, dated September 25, 1969, be and the same hereby are affirmed in all respects, except that, the obvious clerical error in such Order referring to the date of the Examiner's Order for distribution of the estate as May 7, 1969, is ordered to be corrected to reflect the date of March 7, 1969. The other two orders from which this appeal is taken are likewise hereby affirmed. This Decision is final for the Department.

Board of Indian Appeals

David Doane, Alternate Member

I concur:

George V. Allen, Jr.
Alternate Member, Board of
Indian Appeals